Supreme Court, U.S.
FILED
FEB 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-882

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALBERT J. LOVSHIN, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DAVID M. COHEN
RONALD A. SCHECHTER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

28 pp

QUESTION PRESENTED

Whether the court of appeals correctly held that federal agencies retain the discretion to bring performance-based personnel actions against government employees under Chapter 75 of the Civil Service Reform Act of 1978.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	23

TABLE OF AUTHORITIES

Cases:

Adamo Wrecking Co. v. *United States*, 434 U.S. 275	16
Bureau of Alcohol, Tobacco & Firearms v. *Federal Labor Relations Authority*, 464 U.S. 89	13
Chevron U.S.A. Inc. v. *NRDC*, No. 82-1005 (June 25, 1984)	17
Cornelius v. *Nutt*, No. 83-1673 (June 24, 1985)	13
Darby v. *IRS*, 672 F.2d 192	9
Debose v. *United States Dep't of Agriculture*, 700 F.2d 1262	8, 12
Drew v. *United States Dept' of the Navy*, 672 F.2d 197, cert. denied, 459 U.S. 1072	9
Gende v. *Dep't of Justice*, 23 M.S.P.R. 604	6, 11, 16, 18, 19
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439	11
Hanratty v. *FAA*, 780 F.2d 33	12
Hatcher v. *Dep't of the Air Force*, 705 F.2d 1309	8, 14
Hazard v. *Dep't of the Navy*, 24 M.S.P.R. 593	4
Kochanny v. *Bureau of Alcohol, Tobacco & Firearms*, 694 F.2d 698	8-9, 10, 15, 16
Lisiecki v. *MSPB*, 769 F.2d 1558, petition for cert. pending, No. 85-1058 (filed Dec. 19, 1985)	19
Mastriano v. *FAA*, 714 F.2d 1152	15
Morton v. *Mancari*, 417 U.S. 535	11
St. Paul Fire & Marine Ins. Co. v. *Barry*, 438 U.S. 531	10

Cases—Continued: Page

SEC v. *Sloan*, 436 U.S. 103 11
South Corp. v. *United States*, 690 F.2d 1368 15
Turnage v. *United States*, 230 Ct. Cl. 799 ..... 9, 15, 22
United States v. *United Continental Tuna Corp.*, 425 U.S. 164 23
Volkswagenwerk Aktiengesellschaft v. *Federal Maritime Comm'n*, 390 U.S. 261 15
Wells v. *Harris*, 1 M.S.P.B. 199 ..... 5, 10, 12, 16-17, 19
Wood v. *Strickland*, 420 U.S. 308 23
Young v. *Dep't of the Navy*, 7 M.S.P.B. 7 9

Statutes and regulations:

Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 *et seq.* 2
5 U.S.C. 1103(a)(5) 15
5 U.S.C. 2301(b)(6) 11
5 U.S.C. 4301 *et seq.* ..... *passim*
5 U.S.C. 4301(3) 3, 7, 10
5 U.S.C. 4302 ..... 2, 5
5 U.S.C. 4302(b) 4, 10
5 U.S.C. 4302(b)(6) 20
5 U.S.C. 4303 2
5 U.S.C. 4303(a) 7, 10, 11
5 U.S.C. 4303(b)(1)(A) 20
5 U.S.C. 4303(d) 20
5 U.S.C. 4305 15
5 U.S.C. 7101(b) 13
5 U.S.C. 7511 *et seq.* ..... *passim*
5 U.S.C. 7512(D) 11
5 U.S.C. 7513(a) 2, 5, 11, 22
5 U.S.C. 7513(b)(1) 20
5 U.S.C. 7701(c)(1)(A) 3, 13
5 U.S.C. 7701(c)(1)(B) 2, 13, 22
5 U.S.C. 7703(b)(1) 6
5 U.S.C. 7703(c) 8

5 C.F.R.:

Section 831.1206 23
Section 1201.4(a) 4

Regulations—Continued: Page

Section 1201.41 4
Section 1201.113 6

Miscellaneous:

S. Rep. 95-969, 95th Cong., 2d Sess. (1978) 12, 13, 19

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-882

ALBERT J. LOVSHIN, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A62) is reported at 767 F.2d 826. The decision of the Merit Systems Protection Board (Pet. App. B1-B11) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C1) was entered on June 21, 1985. On September 10, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to and in-

cluding November 18, 1985, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the interpretation of two provisions of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*, pursuant to which federal agencies may take remedial actions against their employees. Prior to the enactment of the CSRA, all actions to remove or discipline a government employee—including all performance-based actions—were processed under Chapter 75 of Title 5, United States Code (5 U.S.C. 7511 *et seq.*) (Pet. App. A5-A6). The CSRA did not alter the basic features of Chapter 75; in particular, the Act preserved the general provision that permits agencies to take action against an employee based upon "such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). In any such action, the agency's case must be supported by a preponderance of the evidence (5 U.S.C. 7701(c)(1)(B)), and the agency bears the burden of proving that the action taken "will promote the efficiency of the service." 5 U.S.C. 7513(a).

While Chapter 75 was left largely unchanged, Congress, in enacting the CSRA, did make major revisions to Chapter 43 of Title 5, United States Code (5 U.S.C. 4301 *et seq.*). Of particular relevance to this case, Congress amended Chapter 43 to establish a new performance appraisal system based upon the "elements" of an employee's position. 5 U.S.C. 4302. Under the new system, agencies are authorized to "reduce in grade or remove an employee for *unacceptable performance*" under procedures described in the statute. 5 U.S.C. 4303 (emphasis added). The

CSRA defines "unacceptable performance" as "performance of an employee which fails to meet established performance standards in one or more *critical elements* of one's position." 5 U.S.C. 4301(3) (emphasis added). Thus, the only performance-based actions that may be processed under Chapter 43 are those based upon an employee's failure to meet a critical element of his position;[1] actions based upon generalized poor performance that does not fit within the confines of a critical element do not come within the terms of Chapter 43. The issue in this case is whether the provisions of Chapter 43 are the exclusive means by which an agency may bring a performance-based action against an employee.

2. Petitioner was employed by the Department of the Navy as a civilian engineer. On October 29, 1981, the Navy issued petitioner a Notice of Proposed Termination based upon unsatisfactory performance of his duties. A Notice of Final Decision, dated November 13, 1981, advised petitioner that he would be removed from employment effective November 30, 1981, for the reasons set forth in the proposed notice. On December 10, 1981, petitioner appealed his removal to the Merit Systems Protection Board (MSPB). Pet. App. A2-A3, A41, B1-B2.

In the meantime, the Navy, on October 21, 1981, had submitted to the Office of Personnel Management (OPM) an agency-initiated application for petition-

[1] The agency is held to a lesser standard of proof in a Chapter 43 proceeding than in a Chapter 75 case: actions taken under Chapter 43 are to be sustained if supported by substantial evidence, rather than a preponderance of the evidence. 5 U.S.C. 7701(c)(1)(A). In addition, there is no need for an agency to prove in a Chapter 43 proceeding that its action "will promote the efficiency of the service."

er's disability retirement based on the results of psychiatric evaluations. That application was approved by OPM on or about January 8, 1982, whereupon the Navy moved to dismiss as moot petitioner's appeal to the MSPB of his performance-based removal. The Navy's motion was granted, but, on July 23, 1982, OPM, acting on petitioner's request for reconsideration, reversed its initial decision and disallowed the Navy's disability retirement application. In response to the Navy's request for further reconsideration, OPM reaffirmed the disallowance on September 17, 1982. As a result of OPM's action, the Navy retroactively returned petitioner to his status as of November 30, 1981: removed for unsatisfactory performance. Pet. App. A41-A42, B2-B3.

Thereafter, petitioner renewed his appeal of the removal action to the MSPB, where the case was heard by a presiding official. See 5 C.F.R. 1201.4(a) and 1201.41. On January 20, 1984, the presiding official sustained the agency's removal of petitioner (Pet. App. B1-B11). The presiding official stated that, on the effective date of its action against petitioner, the Navy did not have in place a performance appraisal system that had been approved by OPM (*id.* at B3). See 5 U.S.C. 4302(b).[2] Thus, the pre-

[2] In fact, the presiding official was incorrect in this respect. OPM approved the Navy's performance appraisal system for employees at Grades GS-12 and below (petitioner had been employed as a GS-12) on October 8, 1980, and it approved the Navy's performance appraisal system for employees above Grade 12 on March 25, 1980. Cf. *Hazard* v. *Dep't of the Navy*, 24 M.S.P.R. 593, 595 n.1 (1984). However, the Navy did not begin using its OPM-approved performance appraisal systems until October 1, 1981. This chronology has no bearing on the correct disposition of this case, however, because the court of appeals held that agencies retain the discretion to take

siding official held that the Navy could not proceed against petitioner under the procedures established by Chapter 43 for personnel actions based upon "unacceptable performance" under such an approved appraisal system (Pet. App. B3-B4). However, the presiding official, citing *Wells* v. *Harris*, 1 M.S.P.B. 199 (1979), held that the Navy could proceed against petitioner under the procedures contained in Chapter 75, which, as previously explained, govern adverse actions based upon "such cause as will promote the efficiency of the service" (5 U.S.C. 7513(a)) (Pet. App. B4).[3]

---

performance-based actions under Chapter 75 even after the implementation of Chapter 43's new performance appraisal systems (see Pet. App. A4-A5, A38).

[3] In *Wells*, the Board held that an employee could not be removed for "unacceptable performance" under Chapter 43 if, at the time of his removal, his employing agency had not yet fully implemented the new performance appraisal system mandated by 5 U.S.C. 4302. The issue arose out of a challenge to OPM regulations that were designed to govern the interim period between January 11, 1979, the effective date of the CSRA, and October 1, 1981, the date by which agencies were to have their performance appraisal systems established. OPM's regulations permitted agencies to remove employees under Chapter 43 during this interim period so long as the employees against whom action was to be taken had been informed of the critical elements and performance standards for their particular positions, even if the other elements of a performance appraisal system under 5 U.S.C. 4302 were not yet in place.

The Board held that OPM's interim regulations were invalid, but it stressed that it was not thereby creating a hiatus during which agencies would be prevented from taking performance-based disciplinary actions (*Wells*, 1 M.S.P.B. at 235-236). Instead, the Board ruled that agencies retained the option of proceeding under Chapter 75, so long as they could meet that chapter's higher burden of proof and "efficiency of the service" requirement (*Wells*, 1 M.S.P.B. at 202).

On the facts, the presiding official concluded that the Navy had proved petitioner's unsatisfactory performance by a preponderance of the evidence and sustained his removal under Chapter 75 (Pet. App. B10). The presiding official's decision became the final decision of the MSPB when petitioner did not seek review by the full Board. See 5 C.F.R. 1201.113.

3. Petitioner appealed the Board's decision to the United States Court of Appeals for the Federal Circuit. See 5 U.S.C. 7703(b)(1). While petitioner's case was pending before the court of appeals, the MSPB decided *Gende* v. *Dep't of Justice*, 23 M.S.P.R. 604 (1984). In *Gende*, the Board reversed the position it had taken in *Wells* and ruled that, after October 1, 1981—the date by which agencies were required to have OPM-approved Chapter 43 performance appraisal systems in place—Chapter 75 no longer could be employed to effect performance-based actions. The Board held that, after that date, such actions could be brought only under the procedures established by Chapter 43 for actions based upon "unacceptable performance." *Gende*, 23 M.S.P.R. at 607. The Board recognized that a number of courts of appeals and the Board itself had interpreted *Wells* as providing agencies with the option of proceeding under Chapter 75 in performance-based cases, and it modified its ruling in *Wells* to the extent that *Wells* had allowed for such an interpretation. *Gende*, 23 M.S.P.R. at 609-610.

4. In a divided en banc decision, the court of appeals rejected the rationale of the Board's ruling in *Gende* and held that agencies may continue to employ Chapter 75 to effectuate performance-based personnel actions taken after October 1, 1981 (Pet. App. A1-A44). The court stressed that Chapter 75 had long been used for removals based upon poor performance

and that neither the language nor the legislative history of the CSRA contained a clear expression of congressional intent to bar the continued use of that Chapter after October 1, 1981 (Pet. App. A4). The court noted that, by its express terms, Chapter 43 applies only to actions based upon "unacceptable performance," which is narrowly defined in the statute as the failure to meet a specific "critical element" of an employee's position (5 U.S.C. 4301(3), 4303(a)) (Pet. App. A14-A15). The court concluded that there was no indication that Congress intended to limit a federal agency to Chapter 43 procedures when it was faced with generalized poor performance by an employee; that both the court and its predecessor, the Court of Claims, specifically had approved the optional use of Chapter 75 procedures for performance-based personnel actions; and that other courts of appeals had done so as well (Pet. App. A23-A24).

The court of appeals declined to give special deference to the Board's interpretation of the CSRA as expressed in *Gende*, because that opinion departed from the court's analysis in prior cases and because *Gende* was inconsistent with the Board's own decision in *Wells* and other Board opinions (Pet. App. A30-A31). The court saw no basis in the plain language of Chapters 43 or 75 or in the legislative history of the CSRA for the Board's conclusion in *Gende* that performance-based actions could be taken under Chapter 75 before October 1, 1981, but not after that date (Pet. App. A31).[4]

---

[4] The MSPB was permitted to intervene in the instant case in the court of appeals and asked the court to remand the case to it for reconsideration in light of *Gende* (Pet. App. A3). The court denied the MSPB's request for a remand (*id.* at A38). The dissenting members of the court of appeals

With regard to the merits, the court of appeals upheld the agency's decision that petitioner's performance was unsatisfactory (Pet. App. A39-A40). See 5 U.S.C. 7703(c). The court rejected petitioner's arguments that he had been removed as a reprisal for having reported alleged wrongdoing, that he was denied due process of law, and that he was the victim of harmful procedural error (Pet. App. A41-A42). As to whether petitioner could be removed while the Navy's application for his involuntary disability retirement was pending before OPM, the court of appeals noted that the MSPB had not addressed this issue and that the record did not indicate that the issue had been raised before the Board. The court therefore declined to rule upon the question and remanded it to the Board for appropriate action. *Id.* at A42-A44.[5]

ARGUMENT

The decision of the en banc court of appeals is correct, and it is consistent with that court's prior rulings and the rulings of other courts of appeals, the Court of Claims, and the MSPB prior to the *Gende* decision. See *Hatcher* v. *Dep't of the Air Force*, 705 F.2d 1309 (11th Cir. 1983); *Debose* v. *United States Dep't of Agriculture*, 700 F.2d 1262 (9th Cir. 1983); *Kochanny* v. *Bureau of Alcohol, Tobacco & Firearms*,

---

agreed with the Board's decision in *Gende* and would have granted the Board's request for a remand (Pet. App. A45-A62).

[5] The court noted that, if it was improper for the Navy to remove petitioner while the disability retirement application was pending before OPM, he might be entitled to back pay from November 30, 1981, the effective date of his removal, to the date of OPM's decision on the disability application in January 1982 (Pet. App. A43-A44).

694 F.2d 698 (Fed. Cir. 1982); *Darby* v. *IRS*, 672 F.2d 192 (D.C. Cir. 1982); *Drew* v. *United States Dep't of the Navy*, 672 F.2d 197 (D.C. Cir.), cert. denied, 459 U.S. 1072 (1982); *Turnage* v. *United States*, 230 Ct. Cl. 799 (1982); *Young* v. *Dep't of the Navy*, 7 M.S.P.B. 7 (1981). As we demonstrate below, the court of appeals' decision is supported by the language and legislative history of the CSRA and promotes Congress's intent to provide agencies with greater flexibility in dealing with poorly performing federal employees.

The position advanced by petitioner, on the other hand, would represent a return to the complex and cumbersome procedures that prompted Congress's enactment of the CSRA. Moreover, it would have the totally unacceptable effect of leaving federal agencies with no remedy whatsoever for certain cases of poor performance. In addition, acceptance of petitioner's argument would not affect the proper disposition of this case, because petitioner is unable to demonstrate any prejudice from the procedures employed by the Navy or that he would have fared any better had the Navy proceeded against him under Chapter 43 instead of Chapter 75. Finally, review of the issue presented would in any event be premature. Petitioner offers nothing but speculation to support his contention that agencies will take advantage of the court of appeals' decision to thwart Congress's purposes in enacting the CSRA. Agencies should be afforded the opportunity to process personnel actions under the guidelines now established by the court of appeals. In the unlikely event that abuses do arise, there will be no shortage of future cases raising the issue that petitioner presents.

1. a. Prior to the enactment of the CSRA, there was no doubt that "an employee's poor performance

could be the basis for dismissal for the efficiency of the service under Chapter 75." *Kochanny*, 694 F.2d at 701. Had Congress intended to alter this long-standing practice and to prohibit the use of Chapter 75 for performance-based personnel actions, one reasonably would expect that intent to be expressed clearly in the language or legislative history of the statute. See, *e.g.*, *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 550 (1978). As the court of appeals found (Pet. App. A31), however, there is no such indication of congressional intent. In fact, both the language and the legislative history of the CSRA support the court of appeals' conclusion that Congress intended Chapter 75 to remain available for use in performance-based cases.

As noted above (see pages 2-3, *supra*), Congress amended Chapter 43 to create a new performance appraisal system based upon the "elements" of an employee's position; some elements are to be deemed "critical," and others are not. 5 U.S.C. 4302(b). Agencies are permitted to demote or to remove an employee under Chapter 43 only for "unacceptable performance," which is a statutory term of art defined as the failure to meet a "critical element" of one's position. 5 U.S.C. 4301(3), 4303(a). "Unacceptable performance" obviously was not intended to be a synonym for general poor or inefficient performance; the statutory definition of the term is limited to the failure to meet a critical element. See *Wells*, 1 M.S.P.B. at 235. Neither poor performance in the non-critical elements of an employee's position nor overall inefficiency that does not fit within the specifics of a particular critical element meets the definition of "unacceptable performance," and neither can

be the subject of a Chapter 43 proceeding.[6] Indeed, the Board conceded in *Gende* that its ruling leaves agencies virtually without a remedy for unsatisfactory performance by an employee unless the employee's poor performance relates to a "critical element." *Gende*, 23 M.S.P.R. at 616 n.18. Had Congress intended to limit agencies to the use of Chapter 43 for all actions based upon poor performance, it certainly would not have confined the applicability of that Chapter to such a narrowly defined term as "unacceptable performance." Cf. *SEC* v. *Sloan*, 436 U.S. 103, 111-112 (1978). Absent a clear statement of congressional intent, it would have been improper for the court of appeals to presume that the authority to bring performance-based actions under Chapter 75 had been repealed by implication. See, *e.g.*, *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974); *Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439, 456-457 (1945).[7]

---

[6] It is clear from other portions of the CSRA that Congress understood the limited scope of the term "unacceptable performance"; when Congress intended a concept broader than that encompassed by the statutory definition of "unacceptable performance," it used appropriate language. Compare, *e.g.*, 5 U.S.C. 2301(b)(6) ("inadequate performance should be corrected") with 5 U.S.C. 4303(a) (removal or demotion based upon "unacceptable performance").

[7] As previously noted, the CSRA left unchanged Chapter 75's authorization for agencies to take action against an employee "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). Congress did add Section 7512(D) to Chapter 75, which states that that Chapter does not apply to "a reduction in grade or removal under section 4303 of this title." However, that provision does nothing more than indicate that Chapters 75 and 43 are separate and distinct and that Chapter 75 procedures do not apply to a Chapter 43 proceeding based upon "unacceptable performance." See Pet. App. A18. The Board recognized this same

b. The pertinent legislative history of the CSRA, albeit scant, also supports the court of appeals' conclusion that Congress had no intention of altering the long-standing practice of applying Chapter 75 to performance-based actions. To be sure, the Senate Report states that, in cases of "unacceptable performance," agencies would be able to take advantage of the streamlined removal procedures established by Chapter 43 (see S. Rep. 95-969, 95th Cong., 2d Sess. 46 (1978)). Nowhere, however, does the legislative history suggest that performance-based actions under Chapter 75 were to be eliminated or that Chapter 43 was intended to be exclusive. This dual approach allows agencies flexibility in remedying poor performance and is consistent with "the expressed congressional concern for the damage done to the civil service by its inability to rid itself of inept employees." *Debose* v. *United States Dep't of Agriculture*, 700 F.2d at 1266. Congress logically intended to permit an agency that could prove its case by a preponderance of the evidence and establish that its action would promote the efficiency of the service to continue to have the option of bringing performance-based charges against an "inept employee" under Chapter 75, whether or not that "inept employee" had met the "critical elements" of his position.

---

point in *Wells*, 1 M.S.P.B. at 236: "Whichever action an agency chooses to pursue, it will have to comply with the procedural requirements of that Chapter." See also *Hanratty* v. *FAA*, 780 F.2d 33, 35 (Fed. Cir. 1985) ("The Board may not simply substitute Chapter 75 for Chapter 43 or vice versa after the parties have presented their evidence. Whether doing so would favor the petitioner or the agency cannot be controlling, after-the-fact switches being inherently unfair and governing procedures under the two chapters being distinct.").

As this Court has stated, one of Congress's major purposes in enacting the CSRA was to "preserv[e] the ability of federal managers to maintain 'an effective and efficient Government.'" *Bureau of Alcohol, Tobacco & Firearms* v. *Federal Labor Relations Authority*, 464 U.S. 89, 92 (1983) (quoting 5 U.S.C. 7101(b)). Accord *Cornelius* v. *Nutt*, No. 83-1373 (June 24, 1985), slip op. 2. Congress created the new Chapter 43 procedures with the stated intent of increasing agencies' flexibility in dealing with employees' poor performance. S. Rep. 95-969, *supra*, at 3, 4.[8] In light of this purpose, it would be anomalous indeed to interpret Chapter 43, which provides agencies with a remedy against a poorly performing employee only if the employee fails to meet a "critical element" of his position, as the exclusive avenue for performance-based removals. As the court of appeals recognized, the new performance appraisal system mandated by Chapter 43 is a highly inexact science "in its infancy of development" (Pet. App. A34). The court of appeals clearly understood the ramifications of this fact (*id.* at A35 (emphasis added)):

> [Agencies] are encouraged by the Federal Personnel Manual to constantly review position standards and evaluation methods and to change as appropriate. * * * As we are beginning to see in appeals of removals under Chapter 43, such review is necessary. The performance ap-

---

[8] Thus, contrary to the Board's suggestion in its brief supporting the petition for a writ of certiorari (at 18), there are important incentives that encourage an agency to proceed under Chapter 43 in a performance-based case, including a lower standard of proof and the absence of the need to demonstrate that its action will promote the efficiency of the service. See 5 U.S.C. 7701(c)(1)(A) and (B).

> praisal systems being utilized by agencies have not approached the level of perfection, either in defining performance standards or in the critical elements of individual positions or in evaluation techniques. Mistakes are made in setting criteria. Aspects of performance which are important to the job may not appear in the written statement of standards; others may be denominated "critical" which should not be. *When such mistakes are made by the agency, the "easy" route of Chapter 43 must be denied.* * * * *However, nothing in the statute or legislative history indicates that an employee should thereby be entitled to his position despite serious performance deficiencies where an agency can meet the heavy burdens of Chapter 75 and can show substantive compliance with merit principles.*

Accord *Hatcher* v. *Dep't of the Air Force*, 705 F.2d at 1312 (footnote omitted) ("Certain forms of substandard performance may not qualify as 'unacceptable performance' but still be of a type that justifies removal to 'promote the efficiency of the service' under Chapter 75."). Congress could not have intended that achievement of the laudable merit principles embodied in the CSRA (see Pet. App. A31-A32, A38) would come at the expense of eliminating agencies' flexibility to deal with a myriad of personnel situations that cannot always be pigeonholed into discrete "critical elements" of an employee's position.

c. The court of appeals was correct in not affording decisive weight to the MSPB's interpretation of Chapters 43 and 75 in *Gende*. First, the Board is not the only agency charged with the interpretation of the CSRA. Congress has granted the Office of Personnel Management equal if not greater authority to

administer the Act and the civil service laws generally (see, *e.g.*, 5 U.S.C. 1103(a)(5) and 4305), and OPM's interpretation of the Act, which accords with the court of appeals' decision, is as deserving of deference as that of the Board. See, *e.g.*, *Mastriano* v. *FAA*, 714 F.2d 1152 (Fed. Cir. 1983). In these circumstances, there was no compelling reason for the Federal Circuit to defer to the Board on a purely legal question of statutory construction. See, *e.g.*, *Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968) ("[T]he courts are the final authorities on issues of statutory construction.").[9]

---

[9] Indeed, the court below had good reason to decline to accept the MSPB's position. The Board's *Gende* decision was contrary to the court of appeals' prior decision in *Kochanny*. In *Kochanny*, the court of appeals was faced with the argument "that by the enactment of the [CSRA], Chapter 43 became the exclusive vehicle for removals" based upon poor performance (694 F.2d at 701). In rejecting that contention, the Federal Circuit cited *Turnage* v. *Dep't of Agriculture*, *supra*, which was decided by its predecessor court and, thus, was binding upon the court of appeals. See *South Corp.* v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982) (en banc) (Court of Claims decisions rendered prior to October 1, 1982, binding on Federal Circuit). *Turnage* held that a performance-based removal action "was properly conducted * * * under Chapter 75" (230 Ct. Cl. at 802). The *Turnage* court also stated that the CSRA "established two different, mutually exclusive procedural routes for disciplining employees on the basis of unsatisfactory job performance" (*id.* at 800).

Although both *Turnage* and *Kochanny* involved performance-based personnel actions effected prior to October 1, 1981, the courts' reasoning in those cases did not turn on that fact. To the contrary, in *Kochanny* the court relied upon the Board's sweeping statements in *Wells* that " '[n]othing in § 7512 prevents actions under the provisions of Chapter 75' "

Second, the Board's views in *Gende* were neither long-standing nor consistent with its prior administrative interpretation of the CSRA. See *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287-288 n.5 (1978). As previously noted (see note 9, *supra*), the Board used sweeping language in *Wells* in holding that Congress did not intend to repeal the well-settled availability of Chapter 75 for performance-based actions (*Wells*, 1 M.S.P.B. at 202). The MSPB reached an entirely different conclusion in *Gende*, based upon the same statutory language and legislative history it considered in *Wells*. The Board attempted to explain its flip-flop by noting that *Wells* involved a personnel action effected prior to the date by which agencies were required to have Chapter 43 performance appraisal systems in place. *Gende*, 23 M.S.P.R. at 609. While that fact may have been of practical significance in *Wells*,[10] it had no effect on the Board's legal analysis and ultimate conclusion: "There is not the slightest evidence in the legislative history to suggest that Chapter 43 was ever to be a refuge for employees to escape Chapter 75. Chapter 43 originated as a relief measure for agencies and it was enacted for that purpose." *Wells*, 1 M.S.P.B. at

---

in performance-based cases and that there was " 'nothing to indicate' " that the CSRA precluded agencies from proceeding under Chapter 75 in performance-based actions. *Kochanny*, 694 F.2d at 701 (quoting *Wells*, 1 M.S.P.B. at 202).

[10] The Board was rightly concerned that, if Chapter 75 procedures were unavailable to an agency that could not make use of Chapter 43 procedures because it did not have in place an OPM-approved appraisal system, the agency would be unable to remove an employee for any performance-related reasons. *Wells*, 1 M.S.P.B. at 235. Of course, the Board's decision in *Gende* sanctions just that result for performance-based personnel actions that do not fall within Chapter 43.

236. Thus, *Gende* represents a major unexplained change in position by the Board. In these circumsances, the court of appeals did not err in declining to accept the Board's most recent statement of its views.[11]

d. For the reasons previously set forth, the court of appeals' decision sensibly interprets Chapters 43 and 75 in a manner consistent with Congress's intent in enacting the CSRA to create a simpler, more flexible system for taking action against poorly performing federal employees. On the other hand, the approach suggested by the Board in *Gende* would result in the type of procedural quagmire that Congress intended to abolish when it enacted the CSRA and, as even the Board was forced to concede (see page 11, *supra*), would allow some cases of poor performance to go altogether unremedied.

---

[11] The MSPB cites (Br. 7, 16) *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), in support of its argument that the court of appeals should have accepted uncritically the Board's most recent statement of its views as the proper interpretation of the CSRA. However, in *Chevron*, the Court was faced with a statutory concept that Congress intended to be interpreted flexibly. Slip op. 25. It therefore was not surprising that the agency in that case would remain flexible in its approach to the term at issue. Here, however, the issue is a fixed legal question that does not call for a flexible or variable approach. In addition, in *Chevron*, the agency's previous position had been mandated by an earlier decision of the court of appeals. *Id.* at 25-26. Thus, the subsequent change in the agency's interpretation did not represent a shift from an approach the agency had developed on its own. In *Gende*, on the other hand, the MSPB simply changed the views it freely adopted in *Wells*, based upon the same statutory language and legislative history and in the face of controlling judicial decisions to the contrary in *Kochanny* and *Turnage*.

The Board itself recognized in *Gende* that it would be foolish and unworkable to apply its prohibition against the use of Chapter 75 in performance-based cases to all situations. Therefore, without support from the statute or its legislative history, the Board immediately carved out exceptions to its newly-created interpretation of the Act (*Gende*, 23 M.S.P.R. at 615-616) and suggested that an agency still could bring a performance-based action pursuant to Chapter 75 if it demonstrated, by a preponderance of the evidence, that such an approach was proper "based on public policy or other considerations. *Gende*, 23 M.S.P.R. at 616. The Board also found it necessary to formulate standards for determining when actions are based solely upon a failure to perform and, thus, actionable only under Chapter 43. The Board framed these standards as rebuttable presumptions, involving such factors as whether the charges directly "relate to an appellant's critical or non-critical elements" or directly involve "the appellant's duties and responsibilities, or work-related tasks, functions, and objectives." *Gende*, 23 M.S.P.R. at 616-617.

It is clear simply from stating these exceptions and standards that the approach envisioned by the Board would be cumbersome and complex. Before reaching the merits of a Chapter 75 case, the Board would be required to determine whether the case met its standards for those cases and, if not, whether the case came within one of the Board's exceptions. Agencies would be concerned about using Chapter 75 for *any* performance-based case, because of the likelihood that their choice would be subjected to an after-the-fact challenge by the employee and analysis by the Board. Congress enacted the CSRA because it considered the previous system to be "time-consuming, expensive,

and aggravating," with decisions often being based upon technicalities rather than upon substance. S. Rep. 95-969, *supra*, at 40. Yet, as noted by the court of appeals, adoption of the *Gende* decision would involve "a return to the technical complexities in disciplinary procedures which Congress described as 'asphyxiating' of merit principles" (Pet. App. A32).

In addition, the *Gende* approach would prohibit an agency from taking *any* action against an employee who habitually failed to perform non-critical elements of his position or whose general poor performance did not fit within the confines of a critical element.[12] Moreover, an agency's choice of penalties in a Chapter 43 proceeding is limited to demotion or removal; no lesser penalty is permitted even if the agency considers it appropriate. *Lisiecki* v. *MSPB*, 769 F.2d 1558, 1564 (Fed. Cir. 1985), petition for cert. pending, No. 85-1058 (filed Dec. 19, 1985). Thus, on the one hand, the *Gende* rule would leave some poor performance cases incapable of remedy; on the other hand, it would *require* only the most severe penalties in all cases that come within its scope. *Gende* would convert Chapter 43 from the "relief measure for agencies" that the Board considered it to be in *Wells*, 1 M.S.P.B. at 236, to an impediment to efficient, flexible agency operations. The court of appeals was correct in rejecting an approach so clearly at odds with Congress's intent in enacting the CSRA.

---

[12] The Board conceded as much in *Gende*, 23 M.S.P.R. at 616 n.18. Although an agency would retain the right to transfer an employee under such circumstances, it would be required to transfer the employee to a position at the same grade level, because it would be barred from demoting him. Thus, under the Board's approach, the problem would not be solved; it simply would be shifted to another location.

e. Petitioner argues (Pet. 17-18) that the court of appeals' decision deprives employees of important procedural rights that are made available under Chapter 43 but not under Chapter 75. See also Br. for the MSPB 18-19. On the facts of this case, petitioner's contention is without merit, because he has not demonstrated any prejudice arising out of the Navy's decision to proceed against him under Chapter 75 instead of Chapter 43.

First, Chapter 75, like Chapter 43, requires 30 days' advance written notice of an agency's proposed action against an employee and the reasons therefor (compare 5 U.S.C. 4303(b)(1)(A) with 5 U.S.C. 7513(b)(1)), and petitioner received such notice in this case (see Pet. App. B1). In this regard, therefore, petitioner's complaint (Pet. 17) that he was deprived of an important right granted under Chapter 43 is simply wrong.

Second, petitioner complains (Pet. 18) that, by proceeding against him under Chapter 75, the Navy deprived him of the opportunity to improve his performance in the 30 days prior to removal, an opportunity that is expressly provided under Chapter 43 (see 5 U.S.C. 4302(b)(6), 4303(d)). While it is true that Chapter 43 is more favorable to employees in this regard than Chapter 75, petitioner's complaint in this case rings hollow. Petitioner had more than ample notice that the Navy considered his performance to be unsatisfactory, and, had he wanted to improve, he had every opportunity to do so. On June 17, 1981, petitioner received an unsatisfactory performance evaluation (C.A. App. 29-39).[13] He received another unsatisfactory performance evaluation on

[13] "C.A. App." refers to the appendix to the government's brief in the court of appeals.

October 1, 1981 (C.A. App. 40-46). Finally, and of perhaps greatest significance, a "Joint Investigation Report" (JIR) prepared in August 1981 also rated petitioner's performance as unsatisfactory (C.A. App. 47-62). The JIR was prepared jointly by two engineers, one selected by management and the other by petitioner's union. Its findings of unsatisfactory performance are therefore entitled to special weight and should have put petitioner on full notice of the deficiencies in his work.

Equally important is the fact that petitioner *was* offered assistance in improving his work, but, as the presiding official found, he declined to accept any help. See Pet. App. B6; C.A. App. 82-83, 92. There is therefore no reason to suppose that petitioner would have fared any better had he been given a formal opportunity to improve under Chapter 43.

Finally, petitioner argues (Pet. 18-19) that he was prejudiced by the use of Chapter 75 in this case because Chapter 43 limits performance-based removals to instances of "unacceptable performance" that occurred during the one-year period immediately preceding the notice of a proposed adverse action. Petitioner complains that the presiding official in this case allowed testimony concerning instances of his unsatisfactory performance going back three years. Again, this departure from the procedures specified under Chapter 43 did not prejudice petitioner. As noted above, petitioner received two unsatisfactory performance ratings in the one-year period immediately preceding his removal, and the JIR was prepared only a few months before he was notified of the agency's intent to remove him. Any testimony concerning unsatisfactory performance prior to the one-year period specified in Chapter 43 was merely

cumulative, and, more important, was not relied upon by the presiding official in his decision.

In short, while it is true that Chapter 43 "gives employees slightly more procedural protections" than Chapter 75, *Turnage*, 230 Ct. Cl. at 801, those additional protections would not have affected the outcome in this case. In addition, the quid pro quo for the slightly enhanced procedural protections of Chapter 43 is that an agency that elects to proceed under that Chapter is held to a much less demanding standard of proof and that its choice of remedy may not be set aside (see note 1, *supra*; Pet. App. A34; *Lisiecki* v. *MSPB*, *supra*). On the other hand, an agency that chooses to proceed under Chapter 75 must prove the employee's poor performance by a higher evidentiary standard and must establish that its action will promote the efficiency of the service. 5 U.S.C. 7513(a) and 7701(c)(1)(B). Thus, providing agencies with the flexibility to select which of the two avenues to pursue does not work any prejudice to employees in general and certainly did not prejudice petitioner in this case.

In a similar vein, petitioner's speculation (Pet. 15-16) that agencies will abuse the court of appeals' decision in a manner that undercuts Congress's goals in enacting Chapter 43 is totally unsupported. Any such abuse is extremely unlikely, because of the requirement that agencies strictly follow the procedures applicable to whichever Chapter of the CSRA they choose to pursue (see note 7, *supra*). In any event, review by this Court on the basis of petitioner's speculation about the possible future effects of the decision below would be premature. Federal agencies should be afforded the opportunity to process their personnel actions in accordance with the rules established by the court of appeals' decision; there will be

ample opportunity to review the question presented by petitioner in a future case, when the Court would have the benefit of the agencies' experience under Chapters 43 and 75.

2. Petitioner also contends (Pet. 16) that his removal was improper because it was accomplished while an application for involuntary disability retirement was pending before OPM. See 5 C.F.R. 831.1206. The merits of this argument were not addressed by the MSPB or the court of appeals (Pet. App. A44). The court of appeals noted that it was unclear whether the issue was raised before the Board and remanded the question to the MSPB "for appropriate action" (*ibid.*). Because the issue was not decided below and is pending before the Board, it should not be addressed by this Court. See, *e.g.*, *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 181-182 (1976); *Wood* v. *Strickland*, 420 U.S. 308, 326-327 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

DAVID M. COHEN
RONALD A. SCHECHTER
Attorneys

FEBRUARY 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 491507 20151